IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE CIVIL JURISDICTION

APPEAL FROM ORDER NO.508 OF 2005
IN
NOTICE OF MOTION NO.2731 OF 2002
IN
S.C.SUIT NO.6343 OF 1985

M/s.Shobhagchand & Sons .. Appellant

v/s.

The Supreme Industries Limited ..Respondent

Mr.V.S.Kapse for the appellant.

CORAM : B.H.MARLAPALLE, J.

DATED : 10th October, 2005

P.C.

The appellant had instituted S.C.Suit No.6343 of 1985 for recovery of an amount of Rs.50,000/- from the defendant with interest at 21% per annum, before the City Civil Court at Mumbai. On 21.6.2002, the said suit was dismissed in terms of the following order:-

> "Heard Mr.Lokhandwala, advocate for the defendants. The suit stands dismissed."

2. Notice of motion No.2731 of 2002 was presented by the plaintiff on or about 20.7.2002 and duly supported by the affidavit. By the said notice of motion, the plaintiff had prayed for restoration of S.C.Suit No.6343 of 1985 but the notice of motion also dismissed on the same fate with innocuous order reading as under:-

"Heard. No grounds made out. Notice of Motion No.3731/02 is dismissed. Removed from the board."

3. In the affidavit filed by the plaintiff in support of the notice of motion, it was stated that the suit was on board on 26.4.2002 for recording evidence and on the same date, the plaintiff alongwith his advocate was present before the Court but the Court had discharged the board by adjourning the suit to 21.6.2002 for recording evidence. On 21.6.2002, since the advocate was held up in the Family Court at Bandra, the plaintiff was requested to remain present and the plaintiff asserted that he was present in Court No.23 and was waiting for his advocate to come under bonafide impression that the suit would be called out in court No.23. At about 1.30 p.m. when his advocate reached the court, he could not found the matter on board of court No.23 and after making necessary enquiry in the said court room, they learnt that the suit was transferred to court room No.26 for recording evidence. Both of them immediately reached to court room No.26 and learnt on making enquiry that the suit was called out when they were not present and was dismissed for default. The plaintiff further stated that he was not aware of the transfer of the suit from court room No.23 to court room No.26. He stated that the default, if any, was not deliberate and intentional and there was sufficient reason made out by him in support of his absence before the court on 21.6.2002. Inspite of this detailed affidavit in

support of the notice of motion, the trial court in the impugned order did not find fit to record reasons for reaching to the conclusion that there was no ground made out to allow the notice of motion. The approach of the trial court is unsustainable and has resulted in miscarriage of justice. It is well settled that an order which is appealable before the higher forum must set out reasons in support of the same. The reasons given by him in the affidavit in support of the notice of motion were required to be examined and the trial court was not prevented from rejecting the said reasons by giving justification in support thereof. The entire approach of the trial court is not in consonance with the well recognized legal position.

4. In the circumstances, this appeal succeeds and the same is hereby allowed. The impugned order dated 1.8.2002 dismissing the notice of motion No.3731 of 2002 is hereby quashed and set aside. The said notice of motion is allowed and S.C.Suit No.6343 of 1985 is restored to the file of the trial court by setting aside the order of dismissal in default passed on 21.6.2002. The trial of the suit is hereby expedited. No costs.

(B.H. MARLAPALLE, J.)